Public Finance Bhd v Hock Seng Housing Development Sdn Bhd (See Ha Chai & Ors, Interveners)

HIGH COURT (IPOH) — ORIGINATING MOTION NO 24–576–89
ABDUL MALEK J
28 FEBRUARY 1991

Land Law *— Charge — Foreclosure — Charges over separate lands for separate accounts — Consolidation of accounts — Foreclosure action under one charge commenced and order for sale made — Consolidation undertaken subsequently — Application for sale of lands under remaining charge made — Chargee requiring payment of all sums due under both accounts for purpose of redemption of lands — Whether chargee entitled to consolidate accounts — Whether chargee entitled to order for sale — National Land Code 1965 ss 245 & 256*

The defendants as registered proprietors of 66 pieces of land (listed in a 'sch A') executed a charge in favour of the plaintiffs to secure the repayment of a loan up to a limit of $560,000 together with interest thereon. Subsequently, the defendants executed another charge of 215 pieces of land (listed in a 'sch B') to secure the repayment of a loan up to the limit of $3.5m together with interest thereon. The plaintiffs applied to the court for an order for sale of the lands listed in sch A, the amounts claimed to be outstanding being based on the consolidation of the accounts in respect of the charges of the lands listed in both sch A and sch B. A dispute arose between the parties as regards a letter dated 7 October 1988 written by the plaintiffs in which the plaintiffs stated that they were exercising their right to consolidate both the accounts. The plaintiffs had commenced a separate foreclosure action in respect of the lands listed in sch B. The order for sale of those lands was made on 30 September 1985. The lands were eventually sold by public auction on 26 May 1990.

The interveners stated that they had each bought one of the lands listed in sch A and had paid to the defendants the full purchase price. Upon hearing of the present foreclosure action, the interveners had made inquiries and were told that the redemption sum for their respective lands was about $8,000. However, when they wanted to make payment, they were told that the redemption sum was about $90,000 due to the consolidation of the defendants' accounts.

It was contended for the defendants that the letter announcing the consolidation of the accounts was of no effect because it was written after the order for sale of the lands listed under sch B had been made. It was said for the defendants that they were willing to repay the redemption sum due for the lands listed in sch A but the plaintiffs had insisted that the defendants pay the sum of $4m due in respect of the lands listed in sch B as well. The interveners said that they were willing to pay the redemption sum due on the respective lands sold to them provided that the calculation of the amount due was not on a post-consolidation basis.

Held, dismissing the application:

(1) Consolidation of accounts ought to be undertaken before any action is taken for the foreclosure of any of the charges which relate to the accounts to be consolidated. The plaintiffs had exercised their right to consolidate the accounts a little too late, considering their earlier action to foreclose on one of the two charges, taking into account the fact that the order for sale was made three years before, and the first auction date one month before, the notice of consolidation. On the date of the notice of the purported consolidation, there was in fact only one charge remaining to foreclose.

(2) In an application for sale of land charged, the court has not only to apply the law but also to invoke the aid of equity in order to be satisfied whether a cause to the contrary has been shown or not. The chargee must not only come to court with proof that the chargor has defaulted, but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the order. This finding stands despite the fact that the chargee has priority over the purchasers by virtue of s 340 of the National Land Code 1965.

(3) As the plaintiffs had calculated the respective redemption sums before the purported consolidation and had informed the interveners of the same, it would not be just nor equitable to ask for ten times the agreed amount by a delayed notice to consolidate. The highhandedness of the plaintiffs in trying to get more than what they ought to receive from the innocent purchasers of the lands listed in sch A can only amount to cause to the contrary under the National Land Code 1965.

(4) The plaintiffs are at liberty to apply for an order for sale of the lands in sch A only based on pre-consolidation calculations.

[Bahasa Malaysia summary

Defendan sebagai tuan punya berdaftar 66 keping tanah (disenaraikan dalam 'jadual A') telah melaksanakan satu gadaian bagi faedah plaintif untuk menjamin pembayaran pinjaman setakat $560,000 bersama dengan bunga ke atasnya. Kemudiannya defendan telah melaksanakan satu lagi gadaian atas 215 keping tanah (disenaraikan dalam senarai 'jadual B') bagi menjamin pembayaran pinjaman setakat $3.5 juta bersama dengan bunga ke atasnya. Plaintif memohon kepada mahkamah untuk mendapati perintah bagi penjualan tanah yang disenaraikan dalam jadual A, jumlah wang yang didakwa belum dijelaskan berdasarkan penyatuan akaun berkenaan dengan gadaian ke atas tanah yang disenaraikan dalam kedua-dua jadual A dan B. Satu pertikaian timbul di antara pihak-pihak mengenai surat bertarikh 7 Oktober 1988 yang ditulis oleh plaintif dalam mana plaintif menyatakan bahawa mereka telah menjalankan hak mereka untuk menyatukan kedua-dua akaun itu. Plaintif telah memulakan satu tindakan halang tebus yang berasingan berkenaan dengan tanah yang disenaraikan dalam jadual

B. Perintah bagi penjualan tanah tersebut telah dibuat pada 30 September 1985. Tanah tersebut akhirnya telah dijual secara lelong awam pada 26 Mei 1990.

Pencelah menyatakan bahawa mereka masing-masing telah membeli satu daripada tanah yang disenaraikan dalam jadual A dan telah membayar kepada defendan harga jualan dengan penuh. Apabila mereka mendapat khabar tentang tindakan halang tebus sekarang ini, pencelah telah membuat siasatan dan telah diberitahu bahawa wang penebusan bagi tanah mereka masing-masing adalah kira-kira $8,000. Walau bagaimanapun, apabila mereka hendak membuat bayaran, mereka telah diberitahu bahawa wang penebusan adalah kira-kira $90,000 disebabkan oleh penyatuan akaun defendan.

Defendan berhujah bahawa surat yang mengumumkan penyatuan akaun-akaun itu tidak berkesan kerana ia telah ditulis selepas perintah penjualan tanah yang disenaraikan dalam jadual B dibuat. Telah dikatakan bagi defendan bahawa mereka bersedia membayar balik wang penebusan yang kena dibayar bagi tanah yang disenaraikan dalam jadual A tetapi plaintif telah menekankan supaya defendan membayar jumlah $4 juta yang kena dibayar berkenaan dengan tanah yang disenaraikan dalam jadual B juga. Pencelah menyatakan bahawa mereka bersedia membayar wang penebusan yang kena dibayar atas tanah yang dijual kepada mereka masing-masing asalkan pengiraan jumlah yang kena dibayar bukan atas asas lepas penyatuan.

Diputuskan, menolak permohonan itu:

(1) Penyatuan akaun harus dimulakan sebelum sebarang tindakan diambil untuk menghalang tebus sebarang gadaian yang berhubungan dengan akaun yang akan disatukan. Plaintif telah menjalankan hak mereka untuk menyatukan akaun agak lambat sedikit, memandangkan tindakan mereka yang lebih awal untuk menghalang tebus satu daripada dua gadaian itu, memandangkan fakta yang perintah penjualan telah dibuat tiga tahun sebelum, dan tarikh lelong pertama sebulan sebelum, notis penyatuan. Pada tarikh notis penyatuan yang didakwa itu, sebenarnya hanya satu gadaian yang tinggal untuk dihalang tebus.

(2) Dalam permohonan bagi penjualan tanah tergadai, mahkamah tidak hanya harus menggunakan undang-undang tetapi juga menggunakan pertolongan ekuiti supaya berasa yakin sama ada kausa bertentangan telah dibuktikan atau tidak. Pemegang gadaian seharusnya tidak hanya datang ke mahkamah dengan bukti yang penggadai telah ingkar, tetapi juga dengan bukti bahawa pemegang gadaian sendiri bebas daripada kesalahan dan bahawa beliau tidak bersalah atas sebarang kelakuan yang tidak munasabah, dan bahawa tiada hak pihak ketiga yang tidak bersalah terjejas oleh perintah itu. Pendapat ini tetap tidak kira fakta yang pemegang gadaian mempunyai prioriti atas pembeli memandangkan s 340 Kanun Tanah Negara 1965.

(3) Oleh kerana plaintif telah mengira wang penebusan masing-masing sebelum penyatuan yang didakwa itu dan telah memberitahu pencelah tentang perkara itu, tidaklah adil atau saksama untuk

meminta sepuluh kali jumlah yang dipersetujui melalui notis penyatuan yang lewat. Kelakuan plaintif yang memaharajalela dalam mencuba untuk mendapat lebih daripada apa yang patut mereka terima dari pembeli tanah yang tidak bersalah yang disenaraikan dalam jadual A hanya boleh membawa kepada kausa bertentangan di bawah Kanun Tanah Negara 1965.

(4) Plaintif bebas memohon untuk perintah penjualan tanah yang disenaraikan dalam jadual A hanya berasaskan pengiraan sebelum penyatuan.]

Cases referred to

1 *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 (folld)

2 *Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, Intervener)* [1989] 1 MLJ 381 (refd)

3 *Joseph s/o Manikam v Topwin Development Sdn Bhd & Ors* [1987] 2 CLJ 52 (refd)

4 *Associated Credit Corp Sdn Bhd v Fahlum Development Sdn Bhd & Anor* [1990] 2 CLJ 954 (refd)

Legislation referred to

National Land Code 1965 ss 245, 256

Ting Moy Hong (*Lim Seong Chun & Co*) for the plaintiffs.
Gurbachan Singh (*Bachan & Kartar*) for the defendants.
Chan Kok Keong (*Chan & Associates*) for the first and second interveners.
G Ramanaidu (*R Naidu & Co*) for the third intervener.

Abdul Malek J: It is not disputed that on 13 August 1977 the defendants as registered proprietors had executed a charge in favour of the plaintiffs of 66 pieces of land all in the mukim of Kampar, Perak (sch A) to secure the repayment of a loan up to a limit of $560,000 together with interest at the rate of 12% pa on monthly rests, and on the 23 March 1983, the defendants had executed a charge of 215 pieces of land, all of which were also in the mukim of Kampar, Perak (sch B) to secure the repayment of a loan up to a limit of $3.5m together with interest at the rate of 16% pa on monthly rests. What is in dispute is the effect of the plaintiffs' letter dated 7 October 1988 stating that they had exercised their rights to consolidate both the accounts secured by the charges for the lands in both sch A and sch B.

In their originating summons filed on 5 July 1989, the plaintiffs had applied to sell the lands in sch A only to realize the sum of $6,589,256.93 owing as at 7 June 1989, together with interest payable at 17% pa on monthly rests on the balance of $6,544,689.97 and at the rate of 12.5% pa on monthly rests on the rest of the balance, both to be calculated from 1 June 1989 up to the final date of settlement, and for other consequential orders. Despite the application to foreclose for lands under sch A only, the amounts outstanding are based on the consolidation of the charge accounts for both the lands under sch A and sch B.

It is also pertinent to point out that in their supporting affidavit, the plaintiffs' branch manager had affirmed that they had in fact instituted foreclosure proceedings on the lands in sch B vide Ipoh High Court Originating Summons No 312/85.

In the meantime, the interveners had applied to be added on as interveners by summons-in-chambers filed respectively on 29 March 1990, 30 March 1990 and 30 October 1990, which were granted on 30 March 1990, 14 September 1990 and the 2 November 1990 respectively, as there were no objections from the plaintiffs and the defendants. In their supporting affidavits, the first, second and third interveners had stated that they had each bought one of the lands in sch A on 17 February 1981, 20 August 1979 and 15 July 1982 respectively, and had paid the defendants the full purchase price. Upon knowing of the foreclosure action against the defendants, they had made inquiries and were told that the redemption sum for their individual pieces of land was about $8,000. However, when they wanted to make payment, they were told that the redemption sum was about $90,000 due to the consolidation of the defendants' accounts. The third intervener had also exhibited the letter from the plaintiffs dated 6 August 1980 (exh K3 at encl 21) which had given the redemption sums as $11,000 for shophouses, $9,000 for terrace houses and $8,000 for semi-detached houses.

In her submissions, learned counsel for the plaintiffs had told the court that the lands under sch B had in fact been sold by public auction on 26 May 1990 following the order made under Ipoh High Court Originating Summons No 312/85. As such, she was asking only for the order for sale of the lands under sch A.

Learned counsel for the defendants questioned the legality of the purported consolidation of the defendants' accounts of the lands under sch A and sch B by the letter dated 7 October 1988 after the order for sale had been made for the lands under sch B. He was of the view that there was nothing left to consolidate in the circumstances. Learned counsel added that the defendants were quite willing to repay the redemption sum due for the lands in sch A but the plaintiffs had insisted that they pay the balance of $4m due on the lands in sch B as well. In fact, learned counsel had also agreed to the order for sale being made subject to it being confined to the lands under sch A only. Both the two learned counsel for the three interveners submitted that they were quite willing to pay the redemption sums due on their lands provided the calculation was not on a post-consolidation basis.

I had made reference to the Ipoh High Court Originating Summons No 312/85 file and had found that the order for sale had been made way back on 30 September 1985. The first auction date was 3 September 1988 which was about a month before the plaintiffs' notice to consolidate the defendants' two accounts but there were no bidders. It must also be observed that the said notice was some three years after the order for sale of the lands in sch B.

To my mind, consolidation of accounts is permitted under the charge annexures in view of para (xxviii) of the first charge annexure which reads:

> Section 245 of the National Land Code shall not apply to this chargee. In addition to and without prejudice to any other right of consolidation it is hereby declared that the said land shall not be redeemed save and except on payment of

A all moneys due under any charge created by us or any person through whom we claim which is at the date vested in the chargee over any property other than the property comprised in this charge;

and cl 21(a) and (b) of the second charge annexure which reads:

B (a) Section 245 of the National Land Code (restricting the right of consolidation) shall not apply to this charge. In addition to and without prejudice to any other right of consolidation it is hereby declared that the said land shall not be redeemed save and except on payment of not only all moneys secured hereby but also moneys secured by any other charge created by the chargor or any person through whom he claims which is at the date hereof or at any time hereafter charged to or vested in the chargee over any property other C than the property comprised in this charge.

(b) Without prejudice to any other remedy which the chargee may have,the chargee may at any time and without notice to the chargor combine or consolidate all or any of the accounts of the chargor with, and liabilities to the chargee and set-off or transfer any sum or sums standing to the credit of any one or more of such accounts in or towards satisfaction of any of the D liabilities of the chargor hereunder.

However, my considered view is that it ought to be before any action is taken for the foreclosure of any of the charges for the accounts to be consolidated. The plaintiffs here had exercised their right to consolidate a little too late considering their earlier action to foreclose one of the two E charges, taking into account the fact that the order for sale was made three years before, and the first auction date one month before, the notice to consolidate. As such, on the purported date of the notice of consolidation, there was in fact only one charge remaining to foreclose. What was there to consolidate? Moreover, they had calculated the redemption sums before F the consolidation and had informed the purchasers, and it would not be just nor equitable to ask for ten times the agreed amount by a delayed notice to consolidate. The defendants and the interveners here are all willing to pay the redemption sums due before consolidation and I could have ordered the sale of the lands in sch A only based on pre-consolidation accounts, but the highhandedness of the plaintiffs in the matter in trying to get more than G what they ought to receive from the innocent purchasers of the lands in sch A can only amount to cause to the contrary under the National Land Code 1965 (hereinafter 'the Code') to entitle me to dismiss their application altogether with costs.

In an application for sale of land charged, the Federal Court in *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors*[1] had ruled that the H court has not only to apply the law but also to invoke the aid of equity in order to be satisfied whether a cause to the contrary has been shown or not in accordance with s 256(3) of the Code. It further held that the chargee must not only come to court with proof that the chargor has defaulted, but also with proof that the chargee himself is free of fault and that he was not I guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the order. This finding stands despite acknowledging the fact that the chargee has priority over the purchasers by virtue of s 340 of the Code as has been decided in *Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din* (*Datin Hajjah Salma bte Md Jamin,*

Intervener),[2] *Joseph s/o Manikam v Topwin Development Sdn Bhd & Ors*[3] and *Associated Credit Corp Sdn Bhd v Fahlum Development Sdn Bhd & Anor*.[4]

Consequently, the third intervener's application filed on 20 December 1990 for their land to be excluded from the order for sale applied for becomes quite unnecessary and I made no order. The plaintiffs are of course at liberty to apply for an order for sale of the lands in sch A only based on pre-consolidation calculations.

Application dismissed.

Reported by PS Ranjan